No. 15-674

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

STATE OF TEXAS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF 186 MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES AND 39 MEMBERS OF THE U.S. SENATE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are 186 Members of the U.S. House of Representatives and 39 Members of the U.S. Senate. A complete list of amici is set forth in the Appendix. Among them are:

[1] Letters consenting to the filing of this brief are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person, other than amici or their counsel, made any monetary contribution to the preparation or submission of this brief.

U.S. House of Representatives:

- Nancy Pelosi, Democratic Leader
- Steny H. Hoyer, Democratic Whip
- James E. Clyburn, Assistant Democratic Leader
- Xavier Becerra, Democratic Caucus Chair
- Joseph Crowley, Democratic Caucus Vice-Chair
- John Conyers, Jr., Ranking Member, Committee on the Judiciary
- Zoe Lofgren, Ranking Member, Subcommittee on Immigration and Border Security of the Committee on the Judiciary

U.S. Senate:

- Harry Reid, Democratic Leader
- Richard J. Durbin, Democratic Whip
- Charles E. Schumer, Democratic Conference Committee Vice Chair and Policy Committee Chair, and Ranking Member, Subcommittee on Immigration and the National Interest, Committee on the Judiciary
- Patty Murray, Secretary, Democratic Conference
- Patrick J. Leahy, Ranking Member, Committee on the Judiciary
- Robert Menendez, Democratic Hispanic Task Force Chair

As Members of Congress responsible, under Article I of the Constitution, for enacting legislation that will then be enforced by the Executive Branch pursuant to its authority and responsibility under Article II, amici

have an obvious and distinct interest in ensuring that the Executive enforces the laws in a manner that is rational, effective, and faithful to Congress's intent. Given their institutional responsibility, amici would not support executive efforts at odds with duly enacted federal statutes. But where Congress has chosen to vest in the Executive discretionary authority to determine how a law should be enforced and the Executive has acted pursuant to that authority—as is the case here—amici have a strong interest in ensuring that federal courts honor Congress's deliberate choice by sustaining the Executive's action.

SUMMARY OF ARGUMENT

Congress understands that the Executive is often better positioned to determine how to adjust quickly to changing circumstances in complex fields, particularly ones involving law-enforcement and national-security concerns. Congress therefore regularly gives the Executive broad discretion to determine how to enforce such statutes. Rarely has it done so more clearly than in the Nation's immigration laws.

Recognizing the Executive's institutional advantages in the immigration context, Congress has for more than sixty years granted the Executive broad discretionary authority to "establish such regulations; ... issue such instructions; and perform such other acts as [the Secretary] deems necessary for carrying out his authority" under the Immigration and Nationality Act ("INA"). 8 U.S.C. § 1103(a)(3). And in 2002, in the face of a yawning gap between the size of the unauthorized immigrant population and the amount of resources reasonably available for enforcement, Congress charged the Secretary of Homeland Security with "[e]stablishing national immigration enforcement poli-

cies and priorities." 6 U.S.C. § 202(5). Congress thereby encouraged the Executive to focus its resources in a rational and effective manner on cases in which the Nation's interest in removal is strongest, to provide the maximum return on Congress's sizeable but necessarily finite investment in immigration enforcement.

As representatives of diverse communities across the United States, amici have witnessed how an approach to enforcement of the immigration laws that does *not* focus on appropriate priorities undermines confidence in those laws, wastes resources, and needlessly divides families, thereby exacting a severe human toll. Amici thus regard the DAPA Guidance as exactly the kind of "enforcement polic[y]" that Congress charged the Secretary with establishing.[2] Building on the Secretary's decision to prioritize for enforcement threats to national security, border security, and public safety, the DAPA Guidance establishes a "polic[y]" that certain nonpriority immigrants may be considered for "deferred action," *i.e.*, memorialized temporary forbearance from removal, which triggers eligibility for work authorization upon a showing of economic need.

This Court has observed that deferred action is a "commendable exercise in administrative discretion." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) ("*ADC*"). Deferred action is not just a humanitarian exercise. Like other uses of

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[2] Pet. App. 411a-419a (Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, to León Rodriguez, Director, U.S. Citizenship and Immigration Services, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014)). For purposes of this brief, the DAPA Guidance includes the expansion of DACA.

deferred action, the DAPA Guidance facilitates the implementation of the Secretary's priorities and promotes the efficient and effective execution of the immigration laws consistent with the limited enforcement resources available. The Guidance does this by encouraging eligible persons to submit to a background check so they can be identified and classified according to removal priority, and by enabling those with an economic need to support themselves lawfully.

That the Secretary's guidance is within his statutory authority should not be open to doubt. For half a century, the Executive has used deferred action and other forms of discretionary relief in a variety of circumstances, even when not specifically authorized by statute. Congress has approved of those practices, repeatedly amending the immigration laws without foreclosing the Executive's broad discretion to use them—and even enacting provisions that presume the Executive will continue its discretionary practice of deferred action. Similarly, Congress has explicitly recognized the Executive's broad discretion to determine which removable individuals qualify for work authorization and has never disturbed the Executive's decades-long practice of providing work authorization to those granted deferred action.

The court of appeals' holding that the DAPA Guidance is "manifestly contrary to the INA" reflects a misreading of the INA and a faulty approach to interpreting complex regulatory statutes like the immigration laws. The court reasoned that the immigration laws' specific references to discretionary relief from removal and work authorization under certain circumstances implicitly foreclosed discretionary relief and work authorization under others. But deferred action is not a substitute for specific statutory statuses and forms of

discretionary relief, as it grants none of the legal rights that lawful status provides. Moreover, the court's *expressio unius* analysis disregards the broad grants of discretion that are explicit in the immigration laws and the long history of undisturbed executive exercise of that discretion. The court's approach would make it virtually impossible for Congress to grant the Executive the broad authority and discretion required to tackle urgent and unforeseen immigration challenges, while retaining the ability to direct specific enforcement action it deems appropriate. More generally, it would hamper Congress's ability to allocate to the Executive the combination of broad discretion and specific responsibilities so often needed to administer sprawling statutory schemes effectively.

Finally, even if a claim under the Take Care Clause is justiciable, and even if such a claim may be asserted against an Executive officer other than the President, the claim must fail here. The States' challenge rises and falls on the proper interpretation of the immigration laws, and thus should be viewed as presenting only a statutory claim. In any event, the Take Care Clause surely does not prevent an agency faced with the task of removing hundreds of thousands of individuals each year from pursuing such removals in a rational rather than haphazard manner in light of its limited enforcement resources.

ARGUMENT

I. THE DAPA GUIDANCE IS A PERMISSIBLE EXERCISE OF CONGRESSIONALLY GRANTED DISCRETION

A. The Executive Needs Broad Discretion To Adopt Rational Enforcement Priorities And Effective Policies For Their Implementation

Immigration is a complex and dynamic regulatory field. Demographic, social, and political changes at home and abroad can cause abrupt and substantial changes in U.S. immigration patterns. Those changes in turn often generate unforeseeable and urgent challenges for domestic policy, criminal law enforcement, national security, and foreign relations. As this Court recently observed, "[i]mmigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation," and immigration enforcement decisions necessarily "embrace[] immediate human concerns" and "involve policy choices that bear on this Nation's international relations." *Arizona* v. *United States*, 132 S. Ct. 2492, 2498-2499 (2012); *see also Jama* v. *Immigration & Customs Enf't*, 543 U.S. 335, 348 (2005); *Mathews* v. *Diaz*, 426 U.S. 67, 81 n.17 (1976).

Achieving rational and efficient immigration practices requires flexibility in setting and implementing enforcement priorities. Congress has long recognized the Executive's advantage in adapting nimbly to exigencies that may warrant shifts in how law enforcement resources are deployed. *E.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989) ("in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives"); Rodríguez, *Constraint Through Delegation: The Case of Executive Control over Immigra-*

tion Policy, 59 Duke L.J. 1787, 1810 (2010) ("An administrative agency, as a structural matter, is better equipped than Congress to take into account factors that require expertise and speed to discern."); *cf. Bob Jones Univ.* v. *United States*, 461 U.S. 574, 596 (1983) ("in an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems").

Congress has also long recognized that "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). That is especially true in the field of immigration. Removal requires extensive resources, as it typically involves investigation, charge, adjudication, and (if the person is found removable) effectuation of the person's departure; it may also involve detention for certain categories of individuals.

Given the size of the unauthorized immigrant population in the United States, the prospect of removing them all is fanciful and far exceeds the resources that might reasonably be available to enforce the Nation's immigration laws, even as appropriations for enforcement have reached historically high levels (and "exceed[] funding for all the other principal federal criminal law enforcement agencies combined"). Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* 16-17, 20-22 (Migration Policy Institute Jan. 2013). As the government has explained, "DHS has not been able to remove more than four percent of the estimated removable population in any year." Pet. 4; *see also* U.S. Br. 4; Pet. App. 412a (DAPA Guidance) ("Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the

United States."). Inevitably, therefore, the Executive will have to exercise discretion in enforcing the immigration laws.

Congress can and sometimes does define enforcement priorities itself. For example, Congress has directed the Secretary of Homeland Security to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." Department of Homeland Security Appropriations Act, Pub. L. No. 114-4, tit. II, 129 Stat. 39, 43 (2015); *see also* H.R. Rep. No. 111-157, at 8 (2009) (directing DHS to ensure "that the government's huge investments in immigration enforcement are producing the maximum return in actually making our country safer" rather than merely "rounding up as many illegal immigrants as possible"). And as discussed further below, Congress can and does provide for the possibility of making certain accommodations for noncitizens who are not priorities for enforcement, such as authorization to obtain lawful employment.

But it would be impracticable and imprudent for Congress to define enforcement priorities in such detailed fashion that the Executive could never exercise forbearance based on its own judgment, or to prescribe all of the particular circumstances in which a given accommodation might be provided to a noncitizen. "It is not necessary," this Court has observed in the immigration context, "that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950). Rather, as Congress recognizes, the Executive's superior ability to monitor and respond to changing conditions

better places it to ensure that Congress receives a sound return on the investment it makes in immigration enforcement—to know "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Heckler*, 470 U.S. at 831.

B. Congress Has Directed The Executive To Set Rational Enforcement Priorities And To Adopt Policies To Implement Those Priorities

Congress, of course, "legislates against a background assumption of prosecutorial discretion." *Abuelhawa* v. *United States*, 556 U.S. 816, 823 n.3 (2009). As this Court has "repeated time and again," an agency "has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." *Massachusetts* v. *EPA*, 549 U.S. 497, 527 (2007). But in crafting the Nation's immigration laws, Congress has not relied on implicit executive authority. Rather, Congress has explicitly made "broad grants of discretion" to the Executive. *Jean* v. *Nelson*, 727 F.2d 957, 965 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985). Congress expressly authorized the Secretary (previously the Attorney General) to "establish such regulations; ... issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" to execute the INA, including removal. § 1103(a)(3). Thus, as this Court has recognized, a "principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 132 S. Ct. at 2499.

And Congress has gone further. It has explicitly charged the Secretary of Homeland Security with responsibility for "[e]stablishing national immigration enforcement policies and priorities." § 202(5). That charge reflects Congress's judgment that, given limited resources, enforcement of the immigration laws should not be willy-nilly, but should reflect rational priorities.

At a minimum, those provisions authorize the Executive to define enforcement and removal priorities. *ADC*, 525 U.S. at 483 ("At each stage" of removal, "the Executive has discretion to abandon the endeavor."); *Arizona*, 132 S. Ct. at 2499 ("Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all."). But that is not the full ambit of those provisions. They must also be understood to reflect Congress's expectation that the Executive will set enforcement priorities in a rational, consistent, and measured way that focuses the limited enforcement resources on the highest-priority cases. That may include centralized guidance to channel line officers' enforcement decisions. The Executive need not "forswear use of reasonable presumptions and generic rules"—even where "some level of individualized determination" is statutorily required. *Reno* v. *Flores*, 507 U.S. 292, 313 (1993).

Supplying guidance to line personnel is not only permissible but desirable. Given the scale on which immigration enforcement operates, centralized guidance is needed to maintain coherence and rationality. No one has an interest in haphazard enforcement of the immigration laws, least of all the body that writes those laws. Congress's interest is for the Executive to allocate limited enforcement resources in a non-arbitrary and effective manner. That interest is served by centralized guidance that harmonizes and makes predicta-

ble the Executive's enforcement policies and priorities. That is not to say that the central office must or even should direct how each case is to be decided; in properly channeled immigration enforcement, there can be ample room for case-by-case determinations and humanitarian judgment. But impairing the Executive's ability to define general criteria for the exercise of discretion would undermine Congress's ability to enact effective legislation in the immigration context and elsewhere.

In fact, the promulgation of agency guidance channeling the exercise of discretion in removal and other immigration proceedings has become routine.[3] Nor is that practice limited to the immigration context; rather, the heads of other agencies have promoted rational enforcement practice by providing clear guidance to the field. The Department of Justice, for example, promul-

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[3] *See, e.g.*, J.A. 239-240, 247-248, 251 (Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, to Regional Directors et al., *Exercising Prosecutorial Discretion* (Nov. 17, 2000)) ("Meissner Memorandum") (directing INS personnel to exercise discretion in enforcing the immigration laws, describing the removal of "criminal and terrorist aliens" as a high priority, and instructing personnel to "take into account the nature and severity of" an undocumented immigrant's "criminal conduct" in the exercise of their discretion); Memorandum from William J. Howard, Principal Legal Advisor, ICE, to All Offices of the Principal Legal Advisor Chief Counsel, *Prosecutorial Discretion* 8 (Oct. 24, 2005) (instructing ICE attorneys to exercise prosecutorial discretion, and stating "DHS policy that national security violators, human rights abusers, spies, traffickers both in narcotics and people, sexual predators and other criminals are removal priorities"); Memorandum from Julie L. Myers, Assistant Secretary of Homeland Security, to All Field Office Directors and Special Agents in Charge of U.S. Immigration and Customs Enforcement, *Prosecutorial and Custody Discretion* (Nov. 7, 2007) (directing ICE personnel to comply with the Meissner Memorandum on prosecutorial discretion).

gates extensive guidance regarding line prosecutors' exercise of enforcement discretion.[4] The Justice Department further channels the discretion of line prosecutors by directing them to "charge ... the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction."[5] Similarly, the Securities and Exchange Commission has prescribed factors a Director should consider in ranking investigations by order of priority and designating an investigation as a "National Priority Matter."[6] And the Environmental Protection Agency has similar guidance in place.[7]

The Secretary's delegated authority to set enforcement priorities necessarily allows him to establish mechanisms by which a noncitizen's priority level can be readily ascertained and to take due consideration of

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[4] *See, e.g.*, U.S. Attorneys' Manual ch. 9-2.031 (2015) (setting forth "guidelines for the exercise of discretion by appropriate officers of the Department of Justice in determining whether to bring a federal prosecution based on substantially the same act(s) or transactions involved in a prior state or federal proceeding"); *id.* ch. 9-111.120 (setting value thresholds for the government to institute forfeiture proceedings for various types of assets).

[5] *Id.* ch. 9-27.300; *see also* Memorandum from Eric H. Holder, Jr., to All Federal Prosecutors, *Department Policy on Charging and Sentencing* (May 19, 2010).

[6] Securities and Exchange Commission, Enforcement Manual § 2.1.1 (2015).

[7] Memorandum from Earl E. Devaney, Director, Office of Criminal Enforcement, U.S. Environmental Protection Agency, to All EPA Employees Working in or in Support of the Criminal Enforcement Program, *The Exercise of Investigative Discretion* 2 (Jan. 12, 1994) ("establish[ing] the principles that will guide the exercise of the [criminal] investigative discretion by EPA Special Agents ... to maximize [EPA's] limited criminal resources").

the consequences of deciding not to remove a low-priority person. Establishing priorities in immigration enforcement inevitably means that some removable individuals will not be targeted for enforcement, at least for a time. If the Secretary is to focus enforcement resources on those persons who are deemed a priority for removal—and, consequently, to defer enforcement against those who are not—it is surely rational for the agency to have some mechanism by which enforcement personnel can verify whether someone is *not* a priority for enforcement.

Congress also understands that forbearance from removal has significant practical consequences for individuals. At its core, the forbearance decision involves a judgment about whether a person should be allowed to continue to live in the United States for the duration of the Executive's grace. If those persons are to be allowed to remain here for a time, public safety and national security are better served by allowing them to maintain stable familial and community ties and to achieve economic self-sufficiency. Bringing them within established regulatory structures rather than leaving them in perpetual legal limbo not only serves humanitarian goals; it also promotes the Nation's interests in security and public safety that animate the immigration laws.

C. The DAPA Guidance Is Statutorily Authorized

1. The DAPA Guidance is fully authorized both as an "enforcement polic[y]" the Secretary is charged with establishing under Section 202(5), and as an "act[]" the Secretary has "deem[ed] necessary for carrying out" his responsibilities pursuant to Section 1103(a)(3).

Building on the Secretary's (unchallenged and plainly valid) decision to prioritize for enforcement "threats to national security, border security, and public safety," Pet. App. 423a,[8] the DAPA Guidance establishes a policy that certain noncitizens who are not within any of the categories the Secretary has prioritized for enforcement may be considered for "deferred action." Deferred action is not a formal immigration status but rather is documented but revocable forbearance from removal for a finite period that (under preexisting regulations) also permits an individual to seek authorization to work lawfully during that period upon a showing of economic need. Pet. App. 411a-419a; 8 C.F.R. § 274a.12(c)(14). Those features of the DAPA Guidance are appropriate and reasonable means by which the Secretary may implement enforcement priorities and thereby further the efficient and effective removal of noncitizens. *Mourning* v. *Family Publ'ns Serv.*, 411 U.S. 356, 369 (1973) ("Where the empowering provision of a statute states simply that the agency may 'make ... such rules and regulations as may be necessary to carry out the provisions of this Act, ... the validity of a regulation promulgated thereunder will be sustained so long as it is reasonably related to the purposes of the enabling legislation.").

First, deferred action and work authorization create an incentive for low-priority noncitizens to identify themselves to the Department of Homeland Security and submit to a background check. Pet. App. 415a

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[8] Memorandum from Jeh Charles Johnson, Secretary of Homeland Security, to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, et al., *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014).

(DAPA Guidance) (noting intent to encourage individuals "to come out of the shadows, submit to background checks, pay fees, apply for work authorization (which by separate authority [the Secretary] may grant), and be counted"). That self-identification process enables enforcement officials to confirm that applicants in fact present low removal priority and to focus their attention and resources on investigating and processing high-priority cases. *Id.* 418a-419a (instructing enforcement officials to "prevent the further expenditure of enforcement resources" on individuals who may qualify under DAPA, including by seeking administrative closure of any pending removal proceedings); *see also* U.S. Br. 45. The DAPA Guidance thus promotes public safety and national security, for it ensures that millions of individuals in the country without authorization can be identified and screened.

There is certainly no statutory requirement that the Secretary leave low-priority unauthorized persons in the dark as to whether an enforcement action will be brought against them. Widespread agency practice reflects the sensible judgment that persons who are not facing enforcement in the near future should be allowed to go about their lives without the constant fear and anxiety of legal proceedings. In other contexts, for example, the Justice Department and the SEC often provide letters to potential targets informing them of the agency's discretionary determination not to institute, or to defer institution of, proceedings against them. *E.g.*, Pet. App. 117a (King, J., dissenting); Department of Justice, Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks (Aug. 29, 2013); Letter from Mark M. Attar, Senior Special Counsel, SEC Division of Trading and Markets, to Christopher M. Salter, Allen & Overy LLP (Mar. 12, 2015) (explain-

ing conditions under which SEC staff would not recommend enforcement against certain conduct by broker-dealers). Such letters ensure that agency personnel understand and adhere to the agency's judgment, and also play an important role in making discretionary forbearance decisions transparent.

Second, by allowing those accorded deferred action to obtain lawful work, the Secretary helps ensure that his prioritization scheme is not self-defeating or otherwise contrary to the public interest. Many individuals permitted to remain in the United States, even temporarily, must work in order to survive. The Secretary could properly determine that denying such people work authorization during the period of forbearance would undermine the incentive for them to report themselves to the Department of Homeland Security, impair the government's ability to keep track of such individuals, and perpetuate a situation in which millions of individuals live "in the shadows." *Cf. Arizona*, 132 S. Ct. at 2504 (explaining that immigration law's "framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives").[9]

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[9] The States complain that receipt of deferred action or work authorization makes the recipient eligible for various other federal benefits, such as Social Security or Medicare. *See* Opp. 8-9. But it is not the *Secretary* who decides that a particular individual should receive these particular federal benefits. Rather, eligibility for a particular benefit reflects the judgment *of Congress* that, if a person receives deferred action or work authorization, then that person should also receive these benefits. *See* 8 U.S.C. § 1611(b)(2) (Social Security benefits available to those who are "lawfully present"); 8 C.F.R. § 1.3(a)(4)(vi) ("lawfully present" for purposes of

2. The Executive has long used deferred action and similar practices to memorialize discretionary decisions to refrain temporarily from removing a noncitizen or class of noncitizens, and Congress has acquiesced in those practices. "[O]nce an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979). That is the case here.

Although deferred action began "without express statutory authorization," it long ago became a "regular practice" and a "commendable exercise in administrative discretion." *ADC*, 525 U.S. at 484 (quotation marks omitted). The Immigration and Naturalization Service issued guidance on deferred action in 1975. J.A. 184 ("CRS Analysis of June 15, 2012 DHS Memorandum").[10] Regulations recognizing deferred action

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§ 1611(b)(2) includes those who have received "deferred action"); § 1611(b)(3) (Medicare benefits payable to noncitizen who is "lawfully present" and "authorized to be employed"); 42 U.S.C. § 405(c)(2)(B)(i)(I) (Social Security numbers assigned to noncitizens when they become authorized to "engage in ... employment"); 26 U.S.C. § 32(c)(1)(E) (Social Security number is condition of eligibility for Earned Income Tax Credit); 26 U.S.C. § 3304(a)(14)(A) (for federal funding purposes, States may pay unemployment compensation to noncitizens who are "lawfully present"); 49 U.S.C. § 30301 note (state driver's licenses are valid identification for federal purposes if issued only to certain classes of people, including those with deferred action).

[10] Bruno et al., Congressional Research Service, *Analysis of June 15, 2012 DHS Memorandum*, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (July 13, 2012).

have existed continuously since the 1980s. *E.g.*, 8 C.F.R. § 109.1(b)(7) (1982) (stating that noncitizens with deferred action are eligible to apply for work authorization); *id.* § 274a.12(c)(14) (1988) (describing deferred action as "an act of administrative convenience to the government which gives some cases lower priority"); *id.* § 245a.2(b)(5) (1988) (providing that immigrants placed in deferred action before January 1, 1982 and meeting other criteria could apply for adjustment to temporary residence status). As early as 1985, deferred action and two similar forms of discretionary relief from removal (stay of deportation and extended voluntary departure) were "relatively routine." Stephan, *Extended Voluntary Departure and Other Blanket Forms of Relief from Deportation*, Congressional Research Service, 85-599 EPW (Feb. 23, 1985).

Since the 1960s, administrations of both major political parties have continually used discretionary relief from removal on both a case-by-case and a class-wide basis. U.S. Br. 48; J.A. 209-212 (CRS Analysis of June 15, 2012 DHS Memorandum); Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. Rev. 1, 40-44 (2012) (collecting data on uses of deferred action). In 1987, for example, the Reagan Administration established the Family Fairness Program, a policy by which district directors in the Immigration and Naturalization Service ("INS") could choose not to remove some children and spouses of immigrants whose status had become lawful under the Immigration Reform and Control Act of 1986. The Program provided that "INS district directors [could] exercise the Attorney General's authority to indefinitely defer deportation of anyone for specific humanitarian reasons." Nelson, INS Commissioner, *Legalization and Family Fairness—An Analysis* (Oct.

21, 1987), appended to 64 Interpreter Releases No. 41, 1190, 1203 (Oct. 26, 1987).

President George H.W. Bush expanded the Family Fairness Program in February 1990 to allow more spouses of immigrants to qualify for deferral of deportation (and to receive permission to work). The Administration issued policy guidance "to assure uniformity in the granting of voluntary departure and work authorization for the ineligible spouses and children of legalized aliens." J.A. 213.[11]

In 2006, during the administration of President George W. Bush, Immigration and Customs Enforcement ("ICE") reissued the Detention and Deportation Field Officer's Manual, chapter 20.8 of which set out the procedures and standard for granting deferred action.[12] Like the DAPA Guidance, the Manual stated clearly that "deferred action is not an immigration status," and it enumerated "[f]actors to be [c]onsidered ... as part of a deferred action determination." Ch. 20.8(a). The Manual explained that, although deferred action "may, on [its] face, look like a benefit grant," it "really [is] just [a] mechanism[] for formalizing an exercise of prosecutorial discretion." Ch. 20.9.

Congress is well aware of that considerable record of the Executive's use of deferred action and other forms of discretionary relief, and it has repeatedly amended the immigration laws without barring deferred action as a device for memorializing discretion-

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[11] McNary, INS Commissioner, *Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990).

[12] https://www.ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf.

ary decisions to refrain from removal temporarily. USCIS, *Public Laws Amending the INA* (May 2013) (listing dozens of public laws amending the INA since 1986).[13] Indeed, Congress has enacted laws explicitly presupposing the Executive's authority to use deferred action. In doing so, it has gone "well beyond" a mere failure to amend the law and has "manifested [congressional] acquiescence" in that practice. *Bob Jones Univ.*, 461 U.S. at 601.

For example, Congress has provided that the "denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for ... deferred action." 8 U.S.C. § 1227(d)(2).[14] Congress has even taken advantage of the Executive's practice of deferred action itself; for decades, the very congressional committees that are responsible for immigration have routinely asked the Executive to grant unauthorized immigrants deferred

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[13] https://www.uscis.gov/iframe/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-1.html.

[14] *See also* 8 U.S.C. § 1154(a)(1)(D)(i)(II) & (IV) (specifying that certain victims of domestic violence are "eligible for deferred action and work authorization"); Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, § 423(b)(1) & (2), 115 Stat. 272, 361 (specifying that certain relatives of certain individuals killed in the terrorist attacks of Sept. 11, 2001, "may be eligible for deferred action and work authorization"); National Defense Authorization Act for Fiscal Year 2004 ("NDAA"), Pub. L. No. 108-136, § 1703(c)-(d), 117 Stat. 1392, 1694-1695 (2003) (specifying that certain relatives of certain individuals killed in combat "shall be eligible for deferred action, advance parole, and work authorization"); Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, § 202(c)(2)(B)(viii), 119 Stat. 231, 313 (2005) (codified at 49 U.S.C. § 30301 note) (listing "approved deferred action status" as a basis for issuing driving licenses).

action or stays of removal while the committee considered private bills for relief from enforcement of the immigration laws.[15] At this late date, there can be no serious doubt that deferred action, with its attendant legal consequences including work authorization, is a valid form of discretionary forbearance available to the Secretary in cases or classes of cases that he deems appropriate.

3. Congress has also long accorded the Executive the discretion to determine that certain noncitizens—including but not limited to those eligible for deferred action—should be eligible to apply for work authorization. Since 1986, the Nation's immigration laws have provided that an employer may hire a noncitizen if that person is "authorized to be ... employed by this chapter *or by the Attorney General*" (now the Secretary). 8 U.S.C. § 1324a(h)(3). (emphasis added). In enacting that provision, Congress granted the Executive "broad discretion to determine when noncitizens may work in the United States." *Arizona Dream Act Coal.* v. *Brewer*, 757 F.3d 1053, 1062 (9th Cir. 2014).

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[15] *See, e.g.*, Maguire, *Immigration: Public Legislation and Private Bills* 23-25, 253-255 (1997); Letter from Elliot Williams, Assistant Director, Immigrations and Customs Enforcement, to Hon. Elton Gallegly, Chairman, Subcommittee on Immigration Policy and Enforcement, Committee on Judiciary, U.S. House of Representatives (Nov. 9, 2011) (stating that "[p]ursuant to the agreement between DHS and Congress, ... [DHS] will temporarily grant deferred action to the beneficiary" of a private bill for the relief of an unauthorized immigrant, and noting that under 8 C.F.R. § 274a.12(c)(14), the beneficiary could "file for work authorization"); Subcommittee on Immigration and Border Security of the House Committee on the Judiciary, 114th Cong., Rules of Procedure and Statement of Policy for Private Immigration Bills, R. 5 ("In the past, the Department of Homeland Security has honored requests for departmental reports by staying deportation until final action is taken on the private bill.").

The Secretary's authority under Section 1324a(h)(3) encompasses the settled practice of according eligibility for work authorization to noncitizens who receive deferred action. In 1981, five years before Congress enacted Section 1324a(h)(3), the Executive promulgated a regulation (after notice and comment) codifying decades of administrative practice permitting any noncitizen who receives deferred action to apply for work authorization upon a showing of economic necessity. Employment Authorization to Aliens in the United States, 46 Fed. Reg. 25,079 (May 5, 1981); *see* 8 C.F.R. § 109.1 (1982); U.S. Citizenship and Immigration Services, Adjudicator's Field Manual, ch. 38.2. That Congress enacted the broad discretionary language of Section 1324a(h)(3) against that background confirms that it intended to approve of the Executive's preexisting practice of linking work authorization and deferred action and to authorize that practice to continue.

And continue it has. Explicitly invoking Section 1324a(h)(3) the year after it was enacted, the Executive promulgated 8 C.F.R. § 274a.12(c)(14) (1988), which recodified the practice of permitting noncitizens who are granted deferred action to apply for work authorization upon a showing of economic necessity. Control of Employment of Aliens, 52 Fed. Reg. 16,221, 16,228 (May 1, 1987). That regulation remains in force today. And the Executive has repeatedly reaffirmed in other ways its position that it is appropriate to extend eligibility for work authorization to those who receive deferred action. For example, in 2006 ICE directed all field officers that "[a]lthough deferred action is not an immigration status, an alien may be granted work authorization based on deferred action in his or her case, pursuant to 8 CFR 274a.12(c)(14)." ICE, Detention and Deportation Field Officer's Manual ch. 20.8(d); *see also, e.g.*, J.A.

209-212 (CRS Analysis of June 15, 2012 DHS Memorandum).

Congress has enacted legislation confirming the linkage of deferred action and work authorization. 8 U.S.C. § 1154(a)(1)(D)(i)(II) & (IV); USA Patriot Act § 423(b)(1) & (2); 2004 NDAA § 1703(c)-(d). And it has, on occasion, specifically decided that certain persons should be *ineligible* for work authorization.[16] Congress has also amended Section 1324a(h)(3) in other respects. Immigration Act of 1990, Pub. L. No. 101-649, §§ 521(a), 538, 104 Stat. 5053, 5056. But, as with deferred action, Congress has never foreclosed the Executive's authority to allow those persons who are permitted to remain in the country temporarily to obtain lawful employment so that they will not be relegated to illegal activity to survive. Like the Executive's discretionary authority to extend deferred action in the first place, the Executive's discretion to extend work authorization to recipients of deferred action is securely in place.

D. The Court of Appeals' Decision And The States' Arguments Reflect A Flawed Mode Of Analysis

The court of appeals nonetheless held that the DAPA Guidance is "manifestly contrary to the INA" because the INA "directly" and "precise[ly]" *prohibited* the Secretary's action. Pet. App. 70a-71a, 76a, 85a. That conclusion was wrong, and reflects a flawed approach to broad, discretion-granting provisions like those in the Nation's immigration laws.

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[16] *See* 8 U.S.C. § 1226(a)(3) (restrictions on work authorization for noncitizens with pending removal proceedings); § 1231(a)(7) (restrictions on work authorization for noncitizens ordered removed).

There is no provision anywhere in the Nation's immigration laws that prohibits the Executive from taking an action like the DAPA Guidance. The court of appeals' analysis—which focused principally on different forms of administrative relief available to different classes of persons—cannot be squared with the broad grants of discretionary authorities Congress has afforded the Executive in the immigration context. Requiring Congress to specify every form of enforcement forbearance and attendant accommodation that the Executive can undertake would seriously undermine Congress's fundamental objective that the Secretary implement the Nation's immigration laws in a rational and effective manner consistent with resource constraints. The court of appeals' approach could frustrate Congress's ability to vest the Executive with flexibility, not just in the immigration context but also in other complex regulatory fields where enforcement needs shift over time.

1. The crux of the court of appeals' decision was its conclusion that deferred action, as a form of relief available in the Secretary's discretion, would undermine Congress's decision in the INA to make eligibility to remain in this country available only to specific classes of persons and only under specific circumstances. Thus, the court of appeals stated, "In specific and detailed provisions, the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present," such as lawful permanent resident status and refugee status, and "confers eligibility for discretionary relief allowing [aliens in deportation proceedings] to remain in the country," such as cancellation of removal. Pet. App. 71a (quotation marks omitted). In the court of appeals' view, the DAPA Guidance "would allow illegal aliens to receive the ben-

efits of lawful presence ... without complying with any of the requirements ... that Congress has deliberately imposed" to obtain those various forms of status and discretionary relief. *Id.* 73a.

That approach to the INA is fundamentally flawed. Deferred action is not a substitute for those specified statutory statuses and forms of discretionary relief, nor is it an end-run around the statutory requirements for obtaining them. For example, lawful permanent resident status confers the right to remain in the United States for life, to apply for citizenship after five years, and to petition for the admission of close family members, and can be rescinded only if certain limited conditions occur. 8 U.S.C. §§ 1153(a)(2), 1227, 1256(a) & 1427(a). Deferred action confers none of those benefits. Indeed, as the DAPA Guidance emphasizes, deferred action does not confer "any form of legal status" or any "substantive right, immigration status or pathway to citizenship." Pet. App. 413a, 419a. Nor does deferred action confer immunity from the immigration laws. Rather, deferred action may be "terminated at any time at the agency's discretion." *Id.* 413a.[17]

By treating the immigration laws' explicit provision for certain kinds of status or relief as precluding discretionary use of deferred action as contemplated by the DAPA Guidance, the court of appeals in effect invoked the canon of *expressio unius est exclusio alterius* (notwithstanding the court's disclaimer that it was not doing so, Pet. App. 77a). That approach to statutory in-

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[17] Although deferred action may mean that a person is "lawfully present" under certain narrow statutory provisions, lawful "presence" and lawful "status" "are distinct concepts" in the INA with substantially different implications. *Chaudhry* v. *Holder*, 705 F.3d 289, 292 (7th Cir. 2013).

terpretation is inapt here, for several reasons. First, as Judge King explained in dissent below, Pet. App. 148a-149a, reliance on that canon is perilous in interpreting a sprawling statute like the INA, which Congress has added to and amended many times and in piecemeal fashion over decades. It is also an unreliable method for construing a law that emphasizes wide-ranging executive discretion so that the agency can have maximum flexibility in carrying out Congress's objectives. The court of appeals' interpretive approach could seriously inhibit Congress's ability to ensure that agencies have the tools they need to respond to changing circumstances, especially where Congress may not be able to foresee all the challenges that may emerge or to act with dispatch when unanticipated ones arise.

Second, although the immigration laws do refer explicitly to some kinds of discretionary relief, they are also not silent about deferred action. Rather, they explicitly recognize and take as a given the longstanding administrative practice of deferred action. *Supra* pp. 20-22. Indeed, one of the "specific and detailed provisions" cited by the court of appeals states that deferred action may be available even if another form of relief, administrative stay, is denied. § 1227(d)(2), *cited in* Pet. App. 71a n.163. Yet the court of appeals viewed those statutory references to deferred action as supporting its conclusion that Congress prohibited the DAPA Guidance's use of deferred action. The court said that those provisions "identified narrow classes of aliens eligible for deferred action," none of which included the classes covered by the DAPA Guidance. Pet. App. 71a-72a. But that is just another application of *expressio unius*, and it is again inapt because it ignores the immigration laws' broad grants of discretion—indeed responsibility—to the Secretary to set

appropriate priorities *and policies* for enforcement and to take acts he deems necessary for carrying out his responsibilities. § 1103(a)(3); § 202(5).

The court of appeals dismissed those grants of discretionary authority, believing that they "cannot reasonably be construed as assigning decisions of vast economic and political significance ... to an agency." Pet. App. 79a (quoting *Utility Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2444 (2014)); *see also* Pet. App. 76a (quoting *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015)). The precedents on which the court relied, however, do not support its conclusion here. Unlike the DAPA Guidance, the agency interpretations at issue in those cases were not based on explicit broad grants of relevant authority, but rather were "inconsistent with—in fact, would [have] overthrow[n]—the [statute's] structure and design," and contradicted "unambiguous statutory terms" by "purport[ing] ... to establish with the force of law that otherwise-prohibited conduct will not violate the Act." *Utility Air*, 134 S. Ct. at 2442, 2445; *cf. King*, 135 S. Ct. at 2488-2489.

No statutory text purports to limit the Secretary's discretion to accord deferred action. Rather, as this Court has observed, "Congress knows to speak in ... capacious terms when it wishes to enlarge[] agency discretion," *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868 (2013), and in the Nation's immigration laws, Congress has done just that in a field where enforcement discretion is paramount. *See also Massachusetts*, 549 U.S. at 532 ("The broad language of § 202(a)(1) [of the Clean Air Act] reflects an intentional effort to confer the flexibility necessary to forestall ... obsolescence.").

Indeed, the Executive has on many occasions made deferred action available to noncitizens who were *not* covered by any of the explicit statutory provisions for deferred action. *See supra* pp. 19-20. And as discussed above, Congress has acquiesced in those uses of deferred action. The court of appeals suggested that those prior uses of deferred action "are not analogous to DAPA" because they were "done on a country-specific basis, usually in response to" a crisis, or "were bridges from one legal status to another." Pet. App. 81a-82a. On the contrary, many prior uses of deferred action fit neither of those categories. Wadhia, 10 U.N.H. L. Rev. at 42-43 (collecting data on uses of deferred action). In any event, there is no reason to conclude that Congress intended the broad discretion it granted the Executive to reach only those categories. Nor is DAPA's anticipated scale aberrational. At the time the Family Fairness Policy was issued in 1990, the Executive publicly predicted that it would reach 1.5 million noncitizens, which constituted "about 40% of the total removable population at the time." Pet. 7; *see also* U.S. Br. 64. An estimated 38% of the total removable population would be eligible for DAPA. Pet. App. 161a.[18]

2. The court of appeals took a similarly erroneous approach to work authorization, remarking that the INA "specifies classes of aliens eligible and ineligible for work authorization ... with no mention of the class of persons whom [the DAPA Memorandum] would make eligible for work authorization." Pet. App. 74a-75a. But Congress has made clear that the Secretary's authority to grant work authorization is not limited to

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[18] Just as not all eligible noncitizens sought relief under the Family Fairness Program, there is no guarantee that all noncitizens eligible for relief under the DAPA Guidance would apply for it.

the categories specifically made eligible in various statutory sections. As detailed above, not only do Sections 202(5) and 1103(a)(3) contain broad grants of authority to establish policies and necessary implementing regulations, but also Section 1324a(h)(3) specifically grants the Executive broad discretion to grant work authorization *in addition to* the authorization provided elsewhere in the INA. Moreover, Congress enacted Section 1324a(h)(3) long after the Executive had adopted a practice of and regulations for providing work authorization to many classes of noncitizens other than those who are specifically identified in the INA, including those who have received deferred action. 8 C.F.R. § 274a.12(a)(11), (c)(1)-(7), (9)-(12), (14), (16)-(17) & (21); U.S. Br. 63-64. In short, Congress has granted the right to apply for work authorization for certain classes of noncitizens, prohibited it for certain others, and given the Secretary discretion to determine whether to grant it to others, including those who have received deferred action.[19]

The court of appeals also suggested that Section 1324a(h)(3) would be "an exceedingly unlikely place" to find the requisite authority to extend work authorization to individuals granted deferred action. Pet. App. 79a. It reached that conclusion because that provision "does not mention lawful presence or deferred action,

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[19] The court of appeals suggested that "it would be reasonable to construe § 274a.12(c)(14) as pertaining only to those classes of aliens identified *by Congress* as eligible for deferred action and work authorization." Pet. App. 195a n.95 (emphasis added). The regulation contains no such limitation, however, and such a reading would not reflect congressional intent, given that Congress has long been aware that the Executive has used its broad discretion to grant deferred action and work authorization to persons outside the categories specified in the INA.

and ... is listed as a '[m]iscellaneous' definitional provision expressly limited to § 1324a, a section concerning the 'Unlawful employment of aliens.'" *Id.* 78a-79a. That reasoning reflects a serious misunderstanding. Section 1324a(h)(3) is a component of the INA's employment-authorization provisions, which make it unlawful for employers to hire any "unauthorized alien." § 1324a(a)(1)(A). Compliance is assured principally through enforcement against employers. *Arizona*, 132 S. Ct. at 2504. A section defining "unauthorized alien" is thus a natural place for Congress to specify that the Secretary may authorize noncitizens to seek employment. *Arizona Dream Act Coal.*, 757 F.3d at 1062 (Section 1324a(h)(3) vests Executive with "broad discretion to determine when noncitizens may work in the United States").

The States contend that interpreting Section 1324a(h)(3) as a general grant of discretionary authority "would make surplusage of the numerous INA provisions that empower the Executive to authorize work for targeted classes of aliens." Opp. 33. But the court of appeals' and the States' approach would make surplusage of the phrase "or by the Attorney General" in Section 1324a(h)(3), since defining "unauthorized alien" to exclude noncitizens "authorized to be so employed by this chapter" would have sufficed to cover noncitizens authorized to work pursuant to the INA's more specific grants. There is nothing inconsistent with Congress providing the Executive general authority to determine eligibility for work authorization, while in particular cases making clear that a certain class of individuals is or is not eligible for work authorization.

In the immigration laws, Congress reserved certain policy decisions for itself—deciding that certain persons should, or should not, be eligible for relief—and

empowered the agency to examine, as circumstances might arise, whether other persons or categories of persons should or should not be eligible. That is how Congress has legislated in the immigration field and other fields for decades, and Congress depends on that administrative flexibility to ensure that its policies can be implemented in a rational, efficient, and fair way.

II. THE DAPA GUIDANCE PRESENTS NO ISSUE UNDER THE TAKE CARE CLAUSE

The Court should not reach the States' argument that the DAPA Guidance violates the Take Care Clause. That Clause, which provides that the President "shall take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, is undoubtedly a critical part of the constitutional design, and Congress does have a vital interest in ensuring that the President takes care that the laws it enacts are faithfully executed. Congress has at its disposal, and regularly uses, many tools—including gathering information through agency reports, hearings, and investigations, and controlling appropriations—to ensure that the President does so.

The Nation's long history reflects a continual and vibrant dialogue between the Legislative and Executive Branches about the proper implementation of federal statutes. Perhaps the day may come when this Court is called upon, as a matter of urgent necessity, to decide whether the President has abandoned his constitutional obligation to faithfully execute the laws, but this is not that case. To the contrary, this is a straightforward statutory-interpretation case—to be sure, one with significant consequences, but not one in which there is any need to reach the Take Care Clause issue.

Judicial enforcement of the Take Care Clause presents many difficulties.[20] Regardless, in this case the States' effort to invoke the Take Clare Clause must fail at the threshold because "claims simply alleging that the President has exceeded his statutory authority"—which is the import of the States' claim—"are not 'constitutional' claims." *Dalton* v. *Specter*, 511 U.S. 462, 473 (1994). This case "concern[s] only issues of statutory interpretation," *id.* at 474 n.6: if the DAPA Guidance is within the Secretary's statutory authority, then it by definition reflects the faithful execution of the law; otherwise, the DAPA Guidance is simply *ultra vires*, and there would be no need to reach any constitutional issue. *Id.* at 472 ("If all executive actions in excess of statutory authority were *ipso facto* unconstitutional, ... there would ... be[] little need ... for our specifying unconstitutional and *ultra vires* conduct as separate categories."); *see also Bond* v. *United States*, 134 S. Ct. 2077, 2087 (2014) ("it is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional ques-

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[20] A claim under the clause might not be justiciable. *See Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (suggesting that suits under Take Care Clause violate separation of powers); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is ... not to enquire how the executive, or executive officers, perform duties in which they have a discretion."); *Heckler*, 470 U.S. at 832 (non-enforcement decisions have "long been regarded as the special province of the Executive Branch"); *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1427 (2012) ("controversy involves a political question ... where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department"). Also unclear is what role the clause plays in a case like this, where the act challenged is not the President's but rather an agency's. *See Lujan*, 504 U.S. at 577 ("take Care" duty is "the Chief Executive's").

tion if there is some other ground upon which to dispose of the case" (quotation marks omitted)).

Moreover, whatever the meaning or judicially enforceable scope of the Take Care Clause, the DAPA Guidance does not contravene it. *Cf. New York* v. *United States*, 505 U.S. 144, 185-186 (1992) (concluding that federal statute did not violate Guarantee Clause of Article IV, Section 4, "even if we assume that petitioners' claim is justiciable"). As discussed above, the DAPA Guidance reflects a decision by the Secretary, acting within finite congressional appropriations insufficient to remove every removable noncitizen, to channel DHS's enforcement efforts according to a set of removal priorities and to make practical accommodations for low-priority noncitizens during their temporarily continued presence. That is not a deviation from the obligation to faithfully execute the laws; it is its fulfillment. Congress has expressly directed the Secretary to set priorities and policies for carrying out his duties under the immigration laws and to enforce those laws in an efficient manner, and that is exactly what the Secretary has done. § 202(5); *supra* pp. 11-17. Nor is there any evidence that the Secretary has abdicated his enforcement responsibilities; to the contrary, DHS annually deports hundreds of thousands of noncitizens—a number that, because of limited resources, is far fewer than the estimated 1.4 million noncitizens who come within the prioritized categories. U.S. Br. 9. Choosing rational enforcement over haphazard enforcement within the resource constraints that Congress itself has set—as the DAPA Guidance does—is a "faithful[] execut[ion]" of the law. *See Heckler*, 470 U.S. at 832.

CONCLUSION

The Court should reverse the court of appeals' judgment and vacate the injunction.

Respectfully submitted.

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APPENDIX

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